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23 September 2015

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Marlene H. Dortch, Secretary  
Federal Communications Commission  
445 12th Street, S.W.  
Washington, D.C. 20554

via ECFS Filing

Re: Notice of *Ex Parte* Filing (WC Docket No. 12-375)

Dear Ms. Dortch:

Attached for filing in the above-referenced docket please find a copy of a letter that has been transmitted to Commissioner Clyburn and others which identifies a number of areas of commonality emerging from the positions of various parties to the Inmate Calling Services proceeding. That letter also contains several suggested compromises addressing, among other things, rate caps, site commissions and facility cost-recovery fees, and ancillary fees. It is hoped that consideration of these ideas will encourage the parties to come closer together in further support of comprehensive ICS reform and will suggest reform measures that have strong support in the record.

Thank you for your attention to this matter. Please contact me if you have any questions or concerns regarding the attached letter. In the meantime, with all best wishes, I am,

Sincerely yours,

Michael S. Hamden

cc (via email):

Chairman Tom Wheeler  
Commissioner Mignon Clyburn  
Commissioner Michael O'Rielly  
Commissioner Ajit Pai  
Commissioner Jessica Rosenworcel  
Daniel Alvarez  
Rebekah Goodheart  
Madeleine Findley

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23 September 2015

Honorable Mignon Clyburn, Commissioner  
Federal Communications Commission  
445 12th St. S.W.  
Washington, D.C. 20554

via ECFS Filing

Re: *In the Matter of Rates for Interstate Inmate Calling Services* (WC Docket 12-375)

Dear Commissioner Clyburn:

Your leadership in addressing abusive practices that have persisted in the ICS market for more than a decade is laudable and much appreciated. At last, the Commission seems to be approaching the adoption of rules designed to remedy the failure of the market, to redress long-standing injuries to familial and community relations, and to establish just and reasonable ICS rates and practices. However, any regulations the FCC adopts are almost certain to face a legal challenge by interests that have reaped windfall profits from the unscrupulous practices that have brought us to this juncture.

Yet, among key stakeholders who have advocated or recognized the need for substantive, comprehensive reform, there are emerging areas of commonality or consonance which could undergird and significantly buttress Commission action.<sup>1</sup> Indeed the positions of several key stakeholders are sufficiently close that one would expect that a mediated conference among these stakeholders would offer an opportunity for the parties to meet face-to-face, engage in an earnest exchange of ideas, assess the merits of differing positions, and serve as a catalyst to forge a consensus in which to ground new regulations.

In the absence of a formal mediation process, the Federal Communications Commission can find broad support in the record of this proceeding for comprehensive reform of ICS from several diverse stakeholders. As the agency charged with responsibility to promote competition and the widespread deployment of payphone services,<sup>2</sup> establishing just and reasonable charges and practices<sup>3</sup> while ensuring rates that provide fair compensation for “each and every completed

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<sup>1</sup> As an attorney with decades of experience representing prisoners, and having participated in both this proceeding and its predecessor, CC. Docket No. 96-128, Commission action to address failures in the ICS market is gratifying and deeply appreciated.

<sup>2</sup> See, 47 U.S.C. § 276(b)(1)(A).

<sup>3</sup> See, 47 U.S.C. § 201(b).

intrastate and interstate call . . .”,<sup>4</sup> the FCC is uniquely positioned to “draw the lines” that are suggested by the emerging consensus. Unlike key stakeholders in this proceeding, the FCC has no financial interest in the outcome, nor any objective beyond promoting the public interest.<sup>5</sup> The identification of common ground and support from various stakeholders can strengthen final regulations and insulate them from broad-based legal challenges that seem likely and can only serve to lend credence to an inclusive, deliberative process, and underscore the need for, as well as the validity of regulatory action.

### EMERGING AREAS OF CONSONANCE

With the Commission on the verge of taking final action, it is worth reflecting on how far the various interested parties have come over the years in terms of the issues that can and should be addressed in order to arrive at comprehensive reform of the ICS industry. There is now broad consensus from inmate advocates, correctional professionals, and ICS providers that comprehensive regulation must address, among other things, ICS rates, ancillary fees, and commission payments. While the parties disagree on the precise contours that regulations should take regarding those issues, there is no denying that all parties’ views have shifted—and moved closer together—over the course of this proceeding.

And, while there is a broad range of divergent views regarding the many issues pending in this docket, there are fundamental matters about which there can be no genuine dispute. For example, it is clear that the existing ICS market is dysfunctional and unconscionably exploits consumers, who are entirely excluded from contract negotiations regarding ICS services. Furthermore, ICS providers have conceded that the practice of paying “commissions,” which was intended to secure a monopoly with each customer, has spun out of control. With promises of “commission” payments now nearing 100% of revenue, that practice is clearly unsustainable, and the largest ICS providers seek constraints imposed through regulation.<sup>6</sup>

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<sup>4</sup> Section 276 (b)(1)(A).

<sup>5</sup> *See*, 47 U.S.C. § 276(b)(1)(A).

<sup>6</sup> *See, e.g.*, Global Tel\*Link Corp. (GTL), Securus Technologies, Inc. (Securus), and Telmate, LLC (Telmate), Letter from Brian D. Oliver, CEO, GTL, Richard A. Smith, CEO, Securus, and Kevin O’Neill, CEO, Telmate, to Chairman Tom Wheeler, *et al.*, at pp. 3-5 (filed 15 September 2014)(urging the limitation of site commissions to “FCC-prescribed admin-support payments.” [Hereafter, “Consensus” Proposal]. *See also, e.g., Ex Parte* Submission of Securus Technologies, Inc., Attachment B – Pay Tel’s Proposed Rules As Amended By Securus (Clean Version), at p. 31, § 64.6060 (27 July 2015).



There are also other foundational matters as to which there seems to be almost universal agreement: (1) Telecom services further the public interest in rehabilitation and re-integration of offenders; (2) Prisoners, their families, and professionals who serve them greatly benefit from affordable and reliable communications; (3) Corrections professionals and law enforcement people benefit equally from the provision of telecommunications, which further law enforcement, penological, and societal objectives, while providing prisoners a powerful incentive to comply with rules of conduct; and (4) In order that ICS are widely available and emerging technologies can be broadly deployed, ICS providers must receive a reasonable return on investment.

While a consensus on some other points is lacking, few seriously contest the jurisdiction or authority of the FCC to regulate interstate and intrastate ICS rates and practices.

With regard to specific issues such as rate caps, the limitation of ancillary fees and service charges, and third-party payment practices, several specific areas of possible compromise can be discerned.

### **RATE CAPS: DETENTION FACILITIES**

With regard to rate caps, for example, a number of parties have weighed in. The following chart summarizes those proposals which purport to be supported by cost data made part of the record in this proceeding.<sup>7</sup>

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<sup>7</sup> The Human Rights Defense Center [hereafter, HRDC] advocates a flat rate of \$0.05/min. for all types of correctional facilities and all types of calls, noting that “[departments of correction] in at least 8 states currently charge rates at or below that level.” HRDC Comment at p. 11 (29 July 2015).



## Survey of Proposed ICS Tiered Rate Caps for Jails; Rate Caps for Prisons<sup>8</sup>

Facility ADP Tiers	<a href="#">GTL, Securus, Telmate (9/15/14)</a>	<a href="#">Wright (Bazelon Declaration) (1/12/15)</a>	<a href="#">Baker/Wood (7/1/15)</a>	<a href="#">Pay Tel (Proposed rules) (7/13/15)</a>	<a href="#">Baker (7/12/15)</a>
<b>0 – 99</b>	\$.20*	.18-.20	.22	.22	.21
<b>100 – 349</b>	\$.20	.18-.20	.22	.22	.21
<b>350 – 999</b>	\$.20	.08-.10	.20	.20	.21
<b>1,000 – 2,499</b>	\$.20	.08-.10	.18	.18	.18
<b>2,500 +</b>	\$.20	.08-.10	.16	.16	.18

\* Specifies \$.24 rate for collect calls

<b>All Prisons</b>	\$.20	.08-.10	.08	.08	.08-.12-.10
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A survey of the cited proposals shows that there is emerging agreement that the cost data in the record support a tiered approach to rate caps for detention facilities of various sizes. One of the proposals (GTL, Securus, and Telmate) suggests a flat rate in disregard of proposed tiers, but all others seem to be based on an approach supported by data in the record that show significantly higher costs for operating ICS in jails due to comparatively shorter terms of incarceration and the associated high turnover rate, more unbillable calls, higher customer service costs, and higher bad debt and refund processing costs.<sup>9</sup>

The more refined proposals also show a surprisingly narrow range of suggested per-minute rates, even within various tiers. The parties implicitly agree that jail rate caps should not exceed the current FCC interim interstate rate cap of \$.21 per minute for debit and prepaid calls. There is further broad agreement that successively decreasing rates should apply as average daily population increases. Based on proposals by these stakeholders, the following rate caps appear to be supported by the record.

<sup>8</sup> Blue underlined items are hyperlinks to the relevant FCC filing.

<sup>9</sup> See, e.g., Wright Petitioners, Comments, at 14 (Jan. 12, 2015) (proposing rate caps of \$0.08 and \$0.10 per minute in small jails with fewer than 350 beds and \$0.18 and \$0.20 per minute in larger jails and prisons); and see, e.g., *id.*, at Second Further Notice Declaration of Coleman Bazelon, at 12 [hereafter, Bazelon Declaration] (analyzing cost differences between jails with less than 350 ADP and jails with greater than 350 ADP and prisons and proposing a \$0.10 per minute premium for the smaller facilities).



## Suggested Compromise Rates for Detention Facilities<sup>10</sup>

Agency	ADP	Rate
Jails	0-99	\$.21 per minute
Jails	100-349	\$.21 per minute
Jails	350-999	\$.20 per minute
Jails	1,000-2,499	\$.18 per minute
Jails	2,500 & above	\$.16 per minute

### RATE CAPS: PRISONS

A compromise rate at all prisons has also emerged. There is compelling anecdotal evidence that many prison systems charge a flat rate of \$0.05/minute,<sup>11</sup> but advocacy for such a low rate does not arise from an analysis of the cost data submitted in the record and may not accurately reflect costs in other jurisdictions. The larger providers have pushed for higher backstop rates in prison (which appear to far exceed associated costs).<sup>12</sup> Others—including the Wright Petitioners, a state PSC director (Darrell Baker) and an ICS provider (Pay Tel)—all argue for much lower prison rates. Based on the various proposals, it appears the record indicates that a cap of \$0.08/minute for all prisons that currently exceed that rate is appropriate.

### FACILITY “COST-RECOVERY” FEES

“Site commissions” were the original causative factor in driving ICS rates to unconscionable levels, and their elimination—including, as discussed below, elimination of in-kind payments, integrated services, and all other forms of compensation from ICS providers to facilities or their agents—is essential if there is to be meaningful reform. Discussion remains, however, regarding the topic of facility “cost-recovery” fees. Many parties, prominently

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<sup>10</sup> In jails that routinely house large numbers of convicted offenders for extended periods, a downward adjustment in per-minute rates – rates commensurate with those permitted in prisons of comparable size – would seem appropriate.

<sup>11</sup> HRDC Comment at p. 6 (29 July 2015).

<sup>12</sup> There appear to be conflicting views as to the cost of providing ICS services at prisons of various sizes. *Cf.*, *Ex Parte* Submission of Securus Technologies, Inc., pp. 8 – 11 (27 July 2015)(“Not all DOCs are large. Not all jails are small.”)(citation omitted), *with* Darrell A. Baker, Redacted *Ex Parte* Presentation on Jail and Prison Costs, Rates, and Facility Cost Recovery at p. 4 (12 July 2015)(“ The cost per MOU is lowest for the smallest [prison] facilities (up to 4999 ADP), increases for the medium sized facilities, then decreases marginally for the largest sized facilities”).



correctional professionals and ICS providers, argue that facilities incur various costs in administering ICS. The record does not reveal a consistent basis for measuring such costs,<sup>13</sup> and it is replete with examples of “creative accounting.”<sup>14</sup> Indeed, there remain principled reasons to disallow such a fee.<sup>15</sup>

Nonetheless, there are practical matters that deserve consideration. It is self-evident, and the record supports the notion that confinement facilities incur some costs in connection with providing ICS, as they do in the provision of other programs and services.<sup>16</sup> The record provides little clarity regarding the precise amount of these costs, though it is a matter of considerable debate, perhaps because of the inherent variability of correctional facilities. Certainly, the Commission can continue to study this issue over time, but the lack of authoritative, complete data need not foreclose further consideration.

A modest facility “cost recovery” fee in the form of a small per-minute charge added to the rate caps would provide an incentive for facilities to seek the lowest possible calling rates. The lower rates would encourage increased minutes of use and thereby increase revenue to offset administrative costs. The net effect of this dynamic would be to force the market toward the \$.05 per minute rates that several advocates have urged.<sup>17</sup>

Indeed, it is likely that only through such a mechanism can real downward pressure be exerted on ICS rates. Some parties have proposed the Commission take a “hands off” approach to commission payments.<sup>18</sup> But those proposals would leave in place constant upward pressure

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<sup>13</sup> See, e.g., 2nd FNPRM, *supra* n. 2, at p. 20, ¶ 42 (summarizing industry estimates of correctional facility ICS costs). See also, Comments of Martha Wright, *et. al.*, at p. 8 (12 January 2015).

<sup>14</sup> See, e.g., Reply Comments of Martha Wright, *et. al.*, at pp. 13 – 16 (27 January 2015).

<sup>15</sup> See, e.g., Comments of Michael S. Hamden at pp. 9 – 13 (12 January 2015) (unclear whether and to what extent facilities actually incur costs in administering ICS, or that any such costs should be treated differently from other costs associated with ordinary operations of correctional facilities which are borne by the public). Accord, Comments of HRDC at p. 7 (29 July 2015).

<sup>16</sup> *Inmate Calling Report and Order and FNPRM*, 28 FC Rcd at 14134-35, nn.196, 203 (acknowledging that a portion of commission payments may, in some cases, offset costs related to the provision of ICS incurred by correctional facilities).

<sup>17</sup> See, e.g., Comments of HRDC at p. 11 (29 July 2015).

<sup>18</sup> See, e.g., *Ex Parte* Submission of Wright Petitioners, at pp. 5-6 (8 Sept. 2015).





on rates and are simply prescriptions for perpetuation of the intractable practice that plagues the industry today.

A modest concession to rid prisoners and their loved ones of a system that has for decades grossly exploited them and defied regulatory reform would seem a comparatively small price to pay. That should be particularly worthy of consideration since such a compromise would lead to lower rates because of the incentive it creates for contracting authorities. And if an incremental facility “cost recovery” fee could help to establish and solidify far-reaching regulatory reform that puts an end to the greedy, unprincipled, and unconstrained practices that have brought us to this pass, then perhaps it would be worth it.

Among those who have advocated “cost recovery” for correctional facilities, again there is a markedly narrow range of proposals.

### Survey of Proposed Facility “Cost-Recovery” Fees<sup>19</sup>

Facility ADP Tiers	<a href="#"><u>Economist, Inc. (GTL)</u></a> (9/19/14)	<a href="#"><u>Lipman</u></a> (5/1/15)	<a href="#"><u>Baker/Wood</u></a> (7/1/15)	<a href="#"><u>Baker</u></a> (7/12/15)	<a href="#"><u>Pay Tel</u></a> ( <i>Proposed Rules</i> ) (7/13/15)	<a href="#"><u>NSA</u></a> (7/14/15)
<b>0 – 99</b>	.016	.03	.07	.04	.07	.08
<b>100 – 349</b>	.016	.03	.07	.04	.07	.08
<b>350 – 999</b>	.016	.02	.05	.04	.05	.05
<b>1,000 – 2,499</b>	.016	.01	.05	.04	.05	.05
<b>2,500 +</b>	.016	.01	.03	.04	.03	.02
<b>All Prisons</b>	.005	.01*	.02	.01-.02	.02	---

\* Mr. Lipman suggests a tiered rate based on average daily population that does not distinguish between prisons and detention facilities. However, because most prisons are encompassed by system-wide ICS contracts, administrative costs are shared and the functional “cost-recovery” fee would seem to correspond with the 2,500+ ADP tier.

Given the range of these numbers supported by various stakeholders, a conservative approach would suggest a “compromise position” somewhere in the middle, along the following lines.

<sup>19</sup> Again, blue underlined items are hyperlinks to the relevant FCC filing.





### Suggested Compromise Facility “Cost Recovery” Fees

Agency	ADP	Rate
Jails	0-99	\$.04 per minute
Jails	100-349	\$.04 per minute
Jails	350-999	\$.03 per minute
Jails	1,000 – 2,499	\$.02 per minute
Jails	2,500 & above	\$.01 per minute
Prisons	All	\$.01 per minute

Given the insistence of many stakeholders that some cost-recovery mechanism is necessary, and recognizing that adoption of a formal cost-recovery mechanism could serve an important component of lasting and comprehensive reform of the ICS system, adoption of a compromise position would be a reasonable step by the Commission.

However, the adoption of any such facility “cost recovery” must be premised upon the prohibition of in-kind payments, integrated services and all other forms of compensation (advance payments, bonuses, *etc.*) from ICS providers to facilities or their agents. Failure to prohibit such payments would nullify the elimination of site commissions. The current practices of larger ICS providers, paying signing bonuses, advance payments, and utilizing windfall profits to purchase and offer integrated services are well documented.<sup>20</sup> Indeed, as previously observed, the “Consensus” Proposal<sup>21</sup> “would implicitly authorize continuing, unregulated profiteering on products that are far removed from calling services.”<sup>22</sup> Sadly, history has proven that ICS providers will search to find and exploit every perceived regulatory loophole. If real reform is to be achieved, the Commission must eliminate the means by which regulatory reform is currently circumvented, and must also anticipate and foreclose the possibility of future “shenanigans.”

### OTHER POSSIBLE SUBJECTS FOR COMPROMISE

A fair number of additional issues in the pending docket offer the opportunity for key stakeholders to compromise. For instance, there seems to be some level of agreement about the need to address the growing problem of ancillary fees through a specific list of limited, authorized transaction/payment processing fees while prohibiting all other charges. Many parties concur in the need to eliminate pay-per-call convenience options currently in use. The regulations recently adopted by the Alabama Public Service Commission may serve as a useful

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<sup>20</sup> See generally, *e.g.*, *Ex Parte* Submission of Michael S. Hamden (8 July 2015).

<sup>21</sup> See “Consensus” Proposal, *supra*, n. 5.

<sup>22</sup> See *Ex Parte* Submission of Michael S. Hamden at p 4 (8 July 2015).



template for addressing fees in a manner that forecloses all opportunities for manipulation at the consumer's expense.

Additionally, there may be evolving views on the need for close scrutiny of fees charged by third party payment processing companies, a requirement that tariffs be filed for any additional charge to recover the actual cost of security features employed at each facility where such service is in place, and all other mechanisms that result in charges that exceed the established rate caps.

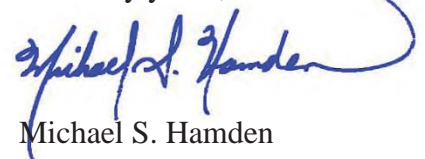
## CONCLUSION

The ultimate resolution of each of the issues raised in this proceeding requires consideration of multiple factors that have to be weighed by the various parties. Absent a compromise, what are the prospects that the outcome of this proceeding will be satisfactory? What are the prospects for a successful appeal, and how much would it cost to prosecute? To what extent does the value of compromise offset the cost and uncertainty of protracted litigation? Does a return to ethical business practices, the restoration of respect, and the good will that will result, suggest good faith consideration of the views of other stakeholders and compromise? And, for publicly elected officials and professional organizations, what are the political implications of existing ICS practices?

It seems likely that these and similar considerations have shaped the evolution of various parties' positions over the long course of this proceeding. The parties are now in agreement about the need for substantive, comprehensive reform. This and other emerging areas of commonality provide a sound basis for Commission action.

Again, thank you for your bold leadership, and for considering these ideas. With all best wishes, I am,

Sincerely yours,

  
Michael S. Hamden



cc (*via* email):

Chairman Tom Wheeler  
Commissioner Mignon Clyburn  
Commissioner Michael O’Rielly  
Commissioner Ajit Pai  
Commissioner Jessica Rosenworcel  
Daniel Alvarez  
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